Editor's note: Appealed -- dismissed, Civ.No. 79-269 (D.Nev. Sept. 18, 1981)

DOROTHY SMITH
KEITH C. HAYES

IBLA 79-178 Decided November 6, 1979

Appeal from the decision of the Nevada State Office, Bureau of Land Management, dated January 9, 1979, declaring a mining claim null and void ab initio and rejecting mineral patent application N-11818.

Affirmed

1. Administrative Procedure: Hearings -- Constitutional Law: Due Process -- Mining Claims: Hearings -- Rules of Practice: Hearings

   Due process does not require notice and a prior hearing in every case that an individual is deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

2. Administrative Procedure: Hearings -- Mining Claims: Hearings -- Rules of Practice: Hearings

   In proceedings before the Department to determine the validity of a mining claim, notice and an opportunity for a hearing is required only where there is a disputed question of fact. Where the validity of a claim turns on the legal effect to be given facts of record concerning the status of the land when the claim was located, no hearing is required.

3. Administrative Authority: Estoppel -- Estoppel

Estoppel of the Government is an extraordinary remedy, especially as it relates to public lands, and is to be applied with the greatest care and circumspection.

The elements of an estoppel are the following: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Estoppel is not available against the Government when the Government agent making representations acts beyond the scope of his authority. Furthermore, reliance upon information or the opinion of any officer or employee of BLM cannot operate to vest any right not authorized by law.

APPEARANCES: Keith C. Hayes, Esq., for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Dorothy Smith and Keith C. Hayes appeal the January 9, 1979, decision of Nevada State Office, Bureau of Land Management (BLM), declaring the Airway Number Nineteen placer mining claim null and void ab initio and rejecting the mineral patent application (N-11818) for this claim.

The records of Clark County, Nevada, show that the Airway Number Nineteen placer mining claim was located on September 20, 1951, and recorded on December 13, 1951. The lands embraced by the claim include the N 1/2 SW 1/4 and the E 1/2 NW 1/4 of sec. 14, T. 20 S., R. 62 E., Mount Diablo meridian, Nevada, and were allegedly valuable for common variety of sand and gravel. Appellant Dorothy Smith was one of the original locators.

The records of the Nevada State Office, BLM, indicate that on the date of location, the lands in the claim were subject in part to oil and gas lease Nev-05915, issued August 1, 1951, and in part to oil and gas lease application Nev-06098, filed on September 4, 1951, for which a lease issued on October 1, 1951.

BLM declared the Airway Number Nineteen claim null and void and rejected appellants' patent application on the grounds that land embraced in oil and gas permits or leases, or allowable applications for such leases, issued under the Mineral Leasing Act of February 25, 1920, are not subject to location under the mining laws. Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957). The BLM decision discussed three alternative means by which the claimants could have cured the claim's invalidity and indicated that the claimants had not successfully taken advantage of any of the three alternatives. The three alternatives are: 1. Congress, through the Act of August 12, 1953, 30 U.S.C. § 501 (1976), and the Multiple Mineral Development Act of August 13, 1954, 30 U.S.C. § 521 (1976), authorized concurrent exploitation of both locatable and leasable mineral resources on public lands by providing a means for validating mining claims located on lands embraced within oil and gas leases, permits, offers, or applications. This Board set forth the procedure for invoking these Acts in Meritt N. Barton, 6 IBLA 293, 296, 79 I.D. 431, 432 (1972):

> [I]n order to have validated any mining claim located subsequent to July 31, 1939, and prior to January 1, 1953, covering lands which at the time of location were included in a permit or lease, or an application for a permit or lease, for leasing act minerals, or which were known to be valuable for such minerals, the owner of the claim must have filed not later than 120 days subsequent to August 12, 1953, an amended notice of location, which notice must have specified that it was filed pursuant to the Act of August 12, 1953, and for the purpose of obtaining the benefits set forth in that Act * * *. [Footnote omitted.]

BLM's examination of the records of Clark County, Nevada revealed that the claimants did not take advantage of the Act of August 12, 1953, as there was no amended notice of location for the Airway Number Nineteen claim filed as of December 10, 1953. Appellants assert that the claimants had no notice or knowledge of the preexisting oil and gas leases and thus had no reason to file an amended notice.

2. The Act of August 13, 1954, supra, in effect opened the lands at issue to location under the mining laws. In addition, the records of the Nevada State Office reveal that BLM cancelled oil and gas lease Nev-05915 on July 31, 1954, and oil and gas lease Nev-06098 on September 30, 1954. Thus, depending on the lands involved, the claimants could have relocated either after cancellation of oil and gas lease Nev-05915 on July 31, 1954, provided that the land was not then known to be valuable for mineral subject to disposition under the mineral leasing laws, or after August 13, 1954. Since the claim was located for a common variety of sand and gravel, such relocation would have had to occur prior to the Act of July 23, 1955, 30 U.S.C. § 611 (1976), which withdrew common variety sand and gravel from location.

Again the record does not indicate that a relocation took place and appellants assert that claimants had no knowledge of the expiration of the oil and gas leases.

3. The third alternative for perfecting the claim arises under the terms of Revised Statute 2332, codified at 30 U.S.C. § 38 (1976). Section 38 provides that a person who has held and worked a mining claim for a period of time equal to the statute of limitations for mining claims of the state where the claim is situated is deemed to have made a location, provided that during the time of holding, the land was open to mining location. Gardner C. McFarland, 8 IBLA 56 (1972); Meritt N. Barton, supra. Nevada has a 2-year statute of limitations for mining claims. Nev. Rev. Stat. § 11.060.

For the lands at issue, the 2-year statute of limitations would have begun on July 31, 1954, or August 13, 1954, and ended in 1956. However, in United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974), this Board held that the 2-year period of use and occupancy must have been completed by July 23, 1955, the date that the lands were withdrawn from location for common variety sand and gravel. BLM held, therefore, that in this case appellants could not have perfected their rights under 30 U.S.C. § 38 (1976).

On appeal, appellants do not challenge the correctness of the BLM conclusions but assert, instead, two grounds for reversing the BLM decision: denial of due process and equitable estoppel.

[1-2] Appellants claim that the failure by BLM to give them an opportunity to investigate and respond to the factual assumptions of the January 9, 1979, decision prior to issuance of the decision was a denial of due process guaranteed by the Constitution. In H. B. Webb, 34 IBLA 362 (1978), the Board addressed precisely this issue:

> [Mitchell v W. T. Grant Co., 416 U.S. 600 (1974)] holds that due process does not require notice and a prior hearing in every case that an individual is deprived of property. Instead, the Court approves in most instances the pre-Sniadach rule that: "[W]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." W. T. Grant Co., supra at 611, 94 S. Ct. at 1902, Sniadach and Fuentes are thereby limited to special situations in which pre-hearing deprivation would be oppressive or manifestly unfair. With respect to Federal administrative procedure the Court in W. T. Grant Co., supra at 612, 94 S. Ct. at 1902, cites with approval Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950). There the Court found no violation of due process where the Food and Drug Administration seized a shipment

> of allegedly misbranded but nondangerous nutritional supplements without prior notice or hearing. The Court ruled that FDA's acts were constitutional, because "[no hearing at the preliminary stage is required] so long as the requisite hearing is held before the final administrative order becomes effective." The Department of the Interior's practices here comport well the Court's formula.

34 IBLA 371-72.

As we also note in H. B. Webb, supra at 372, even if due process were construed to require the Department of the Interior to afford appellants some form of hearing prior to declaring their mineral location null and void, the requirement is satisfied by appellants' appeal to this Board. It is well established that where there are no disputed questions of fact and the validity of a claim turns on the legal effect to be given facts of record which show the status of the land when the claim is located, no hearing before an Administrative Law Judge is required. United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 at 453 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966), aff'g The Dredge Corp., 64 I.D. 368 (1957); 65 I.D. 336 (1958); H. B. Webb, supra; Roy R. Cummins, 26 IBLA 223 (1976); David Loring Gamble, 26 IBLA 249 (1976); Vearl Martin, 18 IBLA 234 (1974). Here, the BLM records clearly establish two oil and gas leases were in force as previously described in this opinion. Although appellants state that the claimants had no knowledge of the oil and gas leases and infer that the leases may not have existed, they have presented no evidence which contradicts the record. We hold that there is no factual dispute as to the existence of the oil and gas leases and thus no hearing was required. 1/

1/ Even if appellants were to challenge the validity of these oil and gas leases rather than their existence, there would still be no factual dispute necessitating a hearing. In a recent decision, Charles House, 42 IBLA 364 (1979), this Board focused on the issue of the validity of oil and gas leases in circumstances identical to those in the present case. We noted that the Department has held that an outstanding oil and gas lease, whether void or voidable, bars any filing for the leased land until the cancellation of the lease is noted on the tract books. Duncan Miller, A-28059, 66 I.D. 388, 391 (1959); Joyce A. Cabot, 63 I.D. 122 (1956); R. B. Whitaker, 63 I.D. 124 (1956); Allan A. Stramler, Jr., A-27949 (June 15, 1959). See Fishman, Some Status Factors Affecting Availability of Public Lands for General Locations, 34 Dicta 243, 248-251 (1957). The simple fact that the oil and gas leases are in the BLM records makes appellants' location null and void ab initio. Thus, appellants would not benefit from a hearing on the issue.

[3] Appellants also contend that this Board should reverse the BLM decision and order that a patent be issued on the ground of equitable estoppel.

On several occasions, this Board has acknowledged the passing of the traditional rule that estoppel cannot be invoked against the Government and has recognized the elements of estoppel set forth by the Ninth Circuit in United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970) as the initial test for determining whether estoppel is appropriate. Edward L. Ellis, 42 IBLA 66 (1979); United States v. Larsen, 36 IBLA 130 (1978); Henry E. Reeves, 31 IBLA 242 (1977). The elements of estoppel as identified in Georgia-Pacific are:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; (4) he must rely on the former's conduct to his injury.

Appellants argue that each of the above elements is present in this case. We disagree.

Appellants claim that they had a reasonable expectation that a patent would be issued for Airway Number Nineteen and that they were justified in relying on that expectation. To support their claim, appellants note first that BLM issued a final certificate of mineral entry for Airway Number Nineteen. They state that the BLM mineral examiner informed them that "he was recommending patent and that patent would issue in a few months." (Appellants' Brief, p. 7.) They note that this was the last communication from BLM that they received until the January 9, 1979, decision. Acting "under the assumption that patent was being processed and would be issued at any time," appellants leased their claim, accepted lease payments, borrowed money on the strength of the leases and expended funds on other development activities on the claim (Appellants' Brief, p. 8). It is these activities which appellants claim they did, relying on BLM's conduct, and which now constitute injury to them.

The processing of a mineral patent application involves numerous considerations. The Secretary of the Interior is not authorized to issue a patent until all of the requirements of the law have been met. United States v. Kiggins, 39 IBLA 88, 136 (1979); United States v. Garner, 30 IBLA 42 (1977). A final certificate of mineral entry indicates to a claimant that he or she has satisfactorily completed certain requirements of the application process and relieves the claimant from doing further assessment work. Following issuance of the final certificate, BLM designates a mineral examiner to prepare a mineral report. If that report is favorable and all else as to the status of the claim is regular, a patent will issue. The patent is not assured until it is actually issued.

Presumably, appellants are familiar with this process since appellant Smith had applied for and been issued a patent on another sand and gravel claim and appellant Hayes has extensive experience with mining claims as an attorney in the Las Vegas area.

We do not doubt that appellants did not know that BLM was considering rejection of their patent application and it is clear that appellants took actions before the final decision on their application which, given the rejection, were detrimental to them. Thus the latter two of the Georgia-Pacific elements of estoppel are present in this case. We conclude, however, that the first two elements have not been satisfied and that appellants' reliance on their assumption that a patent would be issued was not reasonable.

To support their argument for estoppel, appellants assert that the statement of the BLM mineral examiner indicating that a patent would be issued is evidence of misconduct by BLM. Appellant Hayes describes the exchange between the mineral examiner, Mr. Wirtz, and himself as follows: "In early June of 1978, Mr. Wirtz telephoned me and stated that his mineral report had been completed and that he had recommended that patent issue [reference omitted]. Upon my asking how long this would take, he replied `several months at the outside.'" (Affidavit of Keith C. Hayes, p. 2.) If we were to examine this exchange and appellants' reliance on it separately, we would have to conclude that estoppel was unavailable without further need to determine whether the Georgia-Pacific elements were satisfied. The United States Supreme Court has made it quite clear that estoppel is unavailable against the Government when the Government agent making representations acts beyond the scope of his authority. United States v. Eaton Shale Co., 433 F. Supp. 1256, 1272 (D. Colo. 1977), citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); United States v. San Francisco, 310 U.S. 16 (1940); Utah Power and Light Co. v. United States, 243 U.S. 389 (1917). See also Utah v. United States, 284 U.S. 534, 545 (1932); Cramer v. United States, 261 U.S. 219, 234 (1922). Furthermore, it is a well-established Departmental principle that reliance upon information or the opinion of any officer or employee of BLM cannot operate to vest any right not authorized by law. Juan Munoz, 39 IBLA 72 (1979); Public Service Co. of Oklahoma, 38 IBLA 193 (1978); Mark W. Boone, 33 IBLA 32 (1977); W. R. C. Croley, 32 IBLA 5 (1977); 43 CFR 1810.3(c). The mineral examiner is not authorized to decide, but only to recommend, whether a patent should be issued and the mineral report is only one consideration among others in the patent application review process. Appellants had not been issued a patent yet undertook activities as if they had. They can not seek to justify the risk taken and relieve themselves of its consequences by asserting reliance on the unauthorized opinions of a BLM employee.

As a broader basis for estoppel, appellants seemingly argue that, given the final certificate of mineral entry and the favorable mineral report, BLM was under a duty to inform appellants of the possible

rejection of their patent application. We fail to see where there existed such an obligation. There is no dispute that BLM knew the facts as to how it was processing appellants' application. However, BLM had no reason to know about the activities which appellants were undertaking and in no way initiated or sanctioned those activities. Appellants equate their situation to an illustration, noted by the Ninth Circuit in Georgia-Pacific, supra at 97, of the principle that a party's silence will work an estoppel if under the circumstances he or she has a duty to speak. The court said that "[a] common example of this occurs when a plaintiff knowingly permits a defendant to make expenditures or improvements on property the latter believes to be his, but which in fact the plaintiff knows to be the plaintiffs' property." (Emphasis added.) The duty to speak in such a situation arises from the knowledge of one party that the other is acting to his or her detriment. This is not the case on the facts before us. BLM did not know that appellants were undertaking activities which would prove injurious if the patent were not issued. Therefore, BLM did not know the facts that are the grounds for appellants' claim of estoppel and the first element of the Georgia-Pacific test has not been satisfied.

For similar reasons, the second element has also not been met. Having made no final decision prior to January 9, 1979, and being unaware of appellants' activities, BLM could not have intended that appellants proceed in 1978 as though they already held a patent to Airway Number Nineteen. Nor did appellants have a right to believe that BLM intended them to so act. BLM was continuing to process appellants' application; it had given no notice of a decision. As previously discussed, appellants were not justified in relying on the mineral examiner's opinion.

Appellants point to two cases in particular which they believe support their argument for estoppel. They note that each case is factually similar to the one at issue here. We do not find the cases persuasive. Both are distinguishable on the same critical issue. Unlike the situation in appellants' case, the facts of these two cases establish that the party asserting estoppel was justified in relying on affirmative device or representations by the Government and the Government knew or should have known that its advice was incorrect.

In United States v. Wharton, 514 F.2d 406 (9th Cir. 1975), John Wharton inquired of BLM in 1957 how to obtain title to land which his family had farmed since 1919. He was told that there was nothing he could do at that time to obtain title. He inquired again in 1966 and received the same response. In fact, however, it was still possible to obtain a patent under the homesteading laws until May 1967. Thereafter, the Government informed Wharton that he was trespassing and sued for ejectment. Wharton counterclaimed for title. The Ninth Circuit ruled for Wharton on estoppel grounds since it was clear that Wharton would have been able to file a timely homestead entry application if the responsible Government official had not misinformed

him. 2/ The court did not order title to be given to Wharton; it merely directed that BLM afford him the opportunity to file a homestead application to be considered on its merits.

Appellants also cite Gestuvo v. District Director of the U.S. Immigration and Naturalization Service, 337 F. Supp. 1093 (D. Cal. 1971). In this case, Gestuvo, a Philippine citizen, filed a petition for classification as a preference immigrant. The Immigration Service erroneously approved the petition and Gestuvo remained in the United States based on that approval. Eighteen months later the Service determined that it had made a mistake. As the district court noted, "[I]n approving the petition the Service acted as that agency of the United States Government charged with administering the immigration laws. Gestuvo was entitled to believe that the Service's decision was an authoritative determination of his eligibility that was based upon his credentials as they existed at that time." 337 F. Supp. at 1102. Gestuvo's reliance occurred after receiving a formal decision as to his immigrant status. Appellants acted on the basis of no such comparable decision, but rather relied on their own assumptions and the statement of an employee which was beyond the scope of his authority to make.

Appellants also quote extensively from cases which set down considerations of the public interest and notions of fundamental fairness as additional tests for determining when the defense of estoppel

2/ We also note that the Ninth Circuit Court of Appeals held that appellant was misinformed in 1957 when he was told that he could not make a desert land entry on the land. The court held that, in fact, Wharton could have applied for a desert land classification at that time. With due deference to the court, we would point out that, under long-standing precedent, the land embraced by the Wharton claim could not have been classified as suitable for desert land entry in 1957. Wharton had alleged that his father had cultivated the land as early as 1919 and had filed a desert land entry in 1921. His father's desert land entry was cancelled in 1930 for failure to file final proof or make payment. Wharton had alleged that the land had been under continuous cultivation since 1919.

Thus, in 1957, the status of the land was not desert, but reclaimed land. This Department has consistently adhered to the rule that land which has been reclaimed is not subject to entry under the desert land laws. See Mary Helen Conlan, A-29398 (July 23, 1963); George W. Wilkinson, A-29315 (May 2, 1963); Taylor v. Rogers, 14 L.D. 194 (1892). Under Wharton's own assertions, it is clear that the land could not have classified as suitable for desert land entry in 1957.

against the Government is available. 3/ Since appellants have not satisfied the basic elements of estoppel, we find no reason to address those considerations in this case.

Estoppel of the Government is an extraordinary remedy, especially as it relates to public lands and is to be applied with the greatest care and circumspection. United States v. Eaton Shale Co., supra at 1272. Extraordinary circumstances do not exist in this case. Appellants have not been denied a right which would have otherwise been theirs but for governmental misconduct. Appellants would not have been issued the patent even if they had known the true facts because under the law BLM could not issue it. To find estoppel and order issuance of the patent would leave appellants in a better position for having unjustifiably relied on an assumption that a patent would certainly be issued.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

3/ United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), and cases cited therein.